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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 CHRISTOPHER BRADY HOWARD,

8 Plaintiff,

9 v.

10 STATE OF WASHINGTON
11 DEPARTMENT OF CORRECTIONS,
12 GRANT COUNTY DEPARTMENT OF
13 CORRECTIONS, AMANDA GREEN, KIM
14 ALLEN, MERRESSA DAVIS, ANMARIE
15 AYLWARD, LAURIE PETERS, MAGGIE
16 MILLER-STOUT, and STEVEN SINCLAIR,

17 Defendants.

No. C11-5795 RBL/KLS

ORDER TO SHOW CAUSE

18 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28
19 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff's application to proceed *in forma*
20 *pauperis* (ECF No. 1) is pending. The Court has reviewed Plaintiff's proposed civil rights
21 complaint. ECF No. 1-1. The complaint seeks only relief in habeas. Plaintiff has also filed a
22 petition for writ of habeas corpus in Case No. 11-5791RJB. For that reason, the Court declines
23 to serve the complaint in this case. Plaintiff shall show cause why this case should not be
24 dismissed. In the meantime, the Court will hold his application to proceed *in forma pauperis*
25 (ECF No. 1) pending Plaintiff's response to this Order so that Plaintiff will not incur the \$350.00
26 filing fee debt.

ORDER TO SHOW CAUSE- 1

DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998). A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). A complaint or portion thereof, will be dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)(citations omitted). In other words, failure to present enough facts to state a claim for relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct complained of was committed by a person acting under color of state law and (ii) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

1 On the basis of these standards, Plaintiff has failed to state a claim upon which relief can
2 be granted. Plaintiff purports to sue various employees of the Department of Corrections
3 because he is being held past his release date of June 28, 2011. ECF No. 1-1, p. 3. Plaintiff
4 alleges that as a result of his unlawful and continued detention, he has been forced to withdraw
5 from a vocational program thus extending the time in which he can become retrained and re-
6 employed. He alleges that he has missed the birth of his child and is suffering physical,
7 emotional and financial burdens. *Id.*

9 When a person confined by government is challenging the very fact or duration of his
10 physical imprisonment, and the relief he seeks will determine that he is or was entitled to
11 immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ
12 of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to recover damages
13 for an alleged unconstitutional conviction or imprisonment, or for other harm caused by actions
14 whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove
15 that the conviction or sentence has been reversed on direct appeal, expunged by executive order,
16 declared invalid by a state tribunal authorized to make such determination, or called into
17 question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck v.*
18 *Humphrey*, 512 U.S. 477, 486-87 (1994).

20 In addition, prisoners in state custody who wish to challenge the length of their
21 confinement in federal court by a petition for writ of habeas corpus are first required to exhaust
22 state judicial remedies, either on direct appeal or through collateral proceedings, by presenting
23 the highest state court available with a fair opportunity to rule on the merits of each and every
24 issue they seek to raise in federal court. *See* 28 U.S.C. § 2254(b)(c); *Granberry v. Greer*, 481
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1 U.S. 129, 134 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982); *McNeeley v. Arave*, 842 F.2d 230,
2 231 (9th Cir. 1988).

3 State remedies must be exhausted except in unusual circumstances. *Granberry, supra*, at
4 134. If state remedies have not been exhausted, the district court must dismiss the petition.
5 *Rose, supra*, at 510; *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988). As a dismissal solely
6 for failure to exhaust is not a dismissal on the merits, *Howard v. Lewis*, 905 F.2d 1318, 1322-23
7 (9th Cir. 1990), it is not a bar to returning to federal court after state remedies have been
8 exhausted.
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10 Because Plaintiff seeks an earlier release from confinement and damages relating to his
11 continued confinement, his action is not cognizable under 42 U.S.C. § 1983 and the proper
12 course of action to challenge his incarceration is through a habeas corpus petition, which he must
13 first file in state court. In fact, simultaneous with the filing of this action, Plaintiff filed a petition
14 for writ of habeas corpus in this Court. *See, Howard v. Washington Department of Corrections*
15 *and Lang*, Case No. 11-5791 RJB/KLS. Plaintiff has been granted leave to proceed *in forma*
16 *pauperis* in that case and the Court has directed that his habeas petition be served.
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18 In this case, Plaintiff is **ORDERED** to show cause why the Court should not deny his
19 application to proceed *in forma pauperis* and dismiss this case as frivolous. Plaintiff must file a
20 response with this Court on or before **November 18, 2011**. If he fails to do so, the Court will
21 recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal
22 will count as a “strike” under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted
23 April 26, 1996, a prisoner who brings three or more civil actions or appeals which are dismissed
24 on grounds they are legally frivolous, malicious, or fail to state a claim, will be precluded from
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1 bringing any other civil action or appeal in forma pauperis “unless the prisoner is under
2 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

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4 **DATED** this 21st day of October, 2011.

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7 Karen L. Strombom
8 United States Magistrate Judge
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